83-103

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No.

In the Supreme Court of the United States

October Term, 1983

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL 246,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7852

WOODKRAFT DIVISION/GEORGIA KRAFT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued August 31, 1982
Decided January 24, 1983

Before Kravitch, Hatchett and Clark,
Circuit Judges

J. Roy Weathersby (John N. Raudabaugh, Dara L. DeHaven, and Powell, Goldstein, Frazer & Murphy, on brief), Atlanta, Ga., for petitioner.

James Y. Callear (William A. Lubbers, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, and John D. Burgoyne, Assistant General Counsel, on brief), for respondent.

Employer sought review of NLRB order and NLRB sought enforcement. The Court of Appeals Hatchett, Circuit Judge, held that: (1) substantial evidence sustained finding that collective bargaining agreement had been arrived at, and (2) verbal threats made by two employees to a third employee, who was continuing to work, and obscene and crude remarks directed at female management executive as she crossed the picket line did not warrant termination of the offending employees.

Enforcement granted.

Clark, Circuit Judge, filed an opinion concurring in part and dissenting in part.

1. Labor Relations (Key) 680

In reviewing an order of the NLRB, court is bound by the Board's factual findings if they are supported by substantial evidence on the record considered as a whole.

2. Labor Relations (Key) 679

Where NLRB does not accept ALJ's findings, court's examination of the Board's findings must be especially critical.

3. Labor Relations (Key) 679

Disagreement between NLRB and ALJ on factual inferences and legal conclusions does not detract from the substantiality of the evidence which must support the Board's decision and it does not modify the appropriate standard of review in the courts.

4. Labor Relations (Key) 246

Where company did not indicate at any point during negotiations that a new contract was contingent upon reso-

lution of striker discipline issue and where company's purpose in raising the matter was to give the union notice of its proposed action, fact that company had not decided on severity of discipline to be imposed did not preclude a finding that a collective bargaining agreement had been reached by union's acceptance of company's last offer.

5. Labor Relations (Key) 246

Fact that union originally rejected proposals which it later accepted was irrelevant to issue of whether collective bargaining agreement had been reached.

6. Labor Relations (Key) 555

Evidence sustained finding of NLRB that all of employer's proposals were viable at the time that they were accepted by union.

7. Labor Relations (Key) 246

Where neither employer nor union sought to disrupt the continuity between existing contract and the new one, determination of effective date of new agreement following strike did not preclude finding that collective bargaining agreement had been arrived at by union's acceptance of employer's last proposal.

8. Labor Relations (Key) 246

Discrepancies between last proposal made by employer and document prepared by the union embodying the agreement between the parties did not preclude a finding that an agreement had been reached where the discrepancies resulted from the employer's refusal to assist the union in reducing the agreement to writing.

9. Labor Relations (Key) 379

Economic strikers retain their employee status and, upon an unconditional application to return to work, must be reinstated if former or substantially equivalent positions are available.

10. Labor Relations (Key) 538

Employer's refusal to reinstate economic strikers is deemed presumptively discriminatory, but employer may rebut the presumption by demonstrating that the employee engaged in misconduct during the strike falling outside the statutory protections.

11. Labor Relations (Key) 304

NLRB standard that verbal threats, short of a direct threat of immediate physical harm, lose protection of the National Labor Relations Act only when accompanied by physical acts or gestures is consistent with the Act. National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.

12. Labor Relations (Key) 376

Actions of two striking employees in going to the home of a third employee who was continuing to work and stating that the working employee would be "taken care of" was not sufficient to justify their termination from employment. National Labor Relations Act, § 7, as amended, 29 U.S.C.A. § 157.

13. Labor Relations (Key) 304, 376

Employee's crude and obscene remarks directed at female management executive as she crossed the picket line did not warrant his termination; verbal obscenities which

accompany threats of physical harm constitute serious misconduct and are not protected by the National Labor Relations Act but name calling, without more, is privileged under the free speech provisions of the Act. National Labor Relations Act, § 8(c), as amended, 29 U.S.C.A. § 158(c).

Powell, Goldstein, Frazer, & Murphy, J. Roy Weathersby, Atlanta, Ga., for petitioner, cross-respondent.

James Callear, Washington, D.C., for respondent, cross-petitioner.

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board.

Before KRAVITCH, HATCHETT and CLARK, Circuit Judges.

HATCHETT, Circuit Judge:

In this case we decide that substantial evidence supports enforcement of the National Labor Relations Board's ("Board") findings of unfair labor practices by Georgia Kraft Company, Woodkraft Division ("Georgia Kraft" or "Company") arising out of collective bargaining negotiations and the improper termination of striking employees.

I. BACKGROUND

Georgia Kraft is an industrial timber company specializing in the production of lumber, wood chips, paper, and related by-products. This appeal concerns the Company's Greenville, Georgia lumber mill, where, in September, 1977, International Laborer's Union, Local #246 was certified as the exclusive collective bargaining representative of all production and maintenance employees.

A. Contract Negotiations

Pursuant to the terms of the parties' existing collective bargaining agreement, the Union notified the Company in July, 1979, of its desire to renegotiate the agreement. Beginning on September 11, 1979, and on various other dates over the next three months, the parties met to negotiate the terms of a new agreement. Broughton Kelly, Director of Labor Relations, represented the Company throughout the negotiations, and Charles R. Barnes, Business Manager for the Union's district council, represented the Union during the first four bargaining sessions. Howard Henson, the Union's regional manager, represented the Union at sessions held on November 29, and December 3, 1979.

At the first meeting on September 11, the Union submitted proposals of desired changes in the existing agreement. At subsequent meetings, the Company responded to the Union's proposals by either agreeing, insisting that the current contract's provisions remain the same, or proposing changes of its own.[1] Failing to reach an agreement by October 31, the expiration date of the existing contract, the Company and the Union agreed to extend the contract until November 15. When no substantial progress resulted from a brief meeting on November 14, the Union voted to strike the following day. On November 15, all bargaining employees walked off their jobs and established a picket line outside the plant.

On November 27, the parties met and reached agreement on some issues; many provisions, however, remained

1. The Company asserted its position by submitting individual provisions rather than an integrated document. Some of the Company's proposals were handwritten, some typed. As the Board's order notes, "bargaining was not a model of neatness and organization."

unsettled. From the beginning of negotiations, the Company sought elimination of the plant's point system and the establishment of area job classifications and lines of progression in order to diminish lateral movement. Under the point system, each employee was placed in a job classification/pay grade. Each grade had a certain number of points related to the grade. These points entitled the employee to a certain rate of pay. The individual job functions within each department at the plant were assigned points relating to the job. As an employee learned new jobs, he or she received credit for the points assigned to that particular job. The Company disliked this system because seventy-five percent of the employees at the plant had accumulated the total amount of points available within his or her respective department. Accordingly, wages at the Greenville mill were remarkably higher than at other mills.

The Union and Company representatives met again on November 29, at the office of the Federal Mediation and Conciliation Service in Atlanta. Despite the presence of Henson, the Union's regional manager, no significant progress resulted. At a December 3 meeting between Kelly and Henson, Henson presented Kelly with the Union's wage proposal and Kelly gave Henson a Company proposal concerning seniority, departmental point systems, and lines of progression. This was the Company's third such proposal regarding these subjects. Because he was not authorized to make specific concessions, Henson stated that he would take the Company's proposals back to the Union's negotiating committee. At the end of this meeting, Kelly handed Henson a list of striking employees whom the Company planned to discipline because of alleged misconduct during the strike. Henson refused to discuss the striker discipline issue, taking the position that it was a matter between the local union and the Company.

On December 9, the Union's negotiating committee voted to accept the Company's proposals on all unsettled contract provisions and sent the Company the following telegram:

> This is to advise you that the last company offer presented on December 3, 1979, has been accepted as a final and binding contract[.] All employees who could be contacted will return back to work on their regularly assigned shifts effective December 10, 1979[.] We are prepared to meet at your convenience to sign the agreement[.]
>
> Tommy L. Williams Business Manager Local Union 246.

As promised, the strike ended the following day. Kelly notified the Union by letter on December 11, that several matters required resolution before an agreement could be finalized. On the same day, Barnes sent Kelly a letter requesting a meeting in order to finalize the language and sign the agreement. At a meeting on December 19, Kelly presented to Barnes a document entitled "Memorandum of Agreement." This document contained proposals agreed to by the Union's December 9 telegram and a number of strike-related proposals. One such provision called for the termination of twenty-five employees for misconduct and provided that "such terminations are final and binding on the Union." Another provision required the Union to agree to withdraw "any proceeding or filing which it has initiated or plans to initiate with the National Labor Relations Board or courts against the Company or its employees." Barnes acknowledged the Union's agreement on most of the provisions contained in the memorandum, but refused to sign the document because of the inclusion of those provisions regarding strike-related matters and the termination of certain employees.

Until March of 1980, the parties' contacts consisted primarily of Company allegations that specific matters remained unsettled and the Union's counter that it was prepared to sign an agreement as soon as possible. In a March 3 letter to the Union, Kelly strenuously denied that a collective bargaining agreement had been reached and that, in any event, the Union had failed to submit any document which the Company could sign. On March 12, the Union notified the Company that the collective bargaining agreement was typed and ready to be executed and requested a date to meet and sign the agreement. Kelly replied on March 14 by requesting a copy of the alleged agreement and stated that the Company's position remained the same. Subsequent requests by the Company for a copy of the alleged agreement were denied or unanswered, and scheduled meetings were postponed. On July 11, some four months after the agreement was typed and ready for execution, the Union submitted to the Company a draft of what was agreed to on December 9.

B. *Termination of Certain Striking Employees*

At the conclusion of the strike, twenty-eight strikers who reported to the plant for duty were not put back to work. The Company notified twenty-five of those twenty-eight that they had been terminated for alleged misconduct. Among those discharged were Landis Bishop, Jeffrey Hughes, and Preston Barlow.

The Company's separation notices to Bishop and Hughes state that they were discharged for visiting the home of a non-striking employee and threatening his family and property. The non-striking employee, William Walker, testified that Bishop and Hughes came to his home one night during the strike to find out why he had re-

turned to work and was not on the picket lines. Walker, claiming that Bishop and Hughes reeked of liquor, replied that he reported to work because he needed the money. He further testified that Bishop and Hughes made vulgar comments in the presence of his young daughter and pregnant wife.[2]

The Company discharged Preston Barlow for directing vulgar language at Industrial Relations Manager Barbara Lawler while Barlow was on the picket line. Lawler testified that while crossing the picket line in her car on two occasions, Barlow shouted obscene remarks as she passed the picketing employees.[3]

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2. Walker testified on direct examination as follows:

They was standing in there and they was—let's see, it was Landis Bishop. Bishop told me that if I returned to work that he would take care of me and I asked him what he meant by that and he started laughing and Jeff said, "yeah, we'll take care of you." I asked them—I said, "what do you mean by that?" I repeatedly was asking him and he was talking about that I shouldn't have been crossing the picket line and Jeff Hughes called me a "sorry mother fucker" for taking their money away from them. My little girl was standing right beside me. I couldn't leave them and try to get her out of the room.

3. Lawler's testimony is as follows:

Then, he started to—he kind of turned and he was turning, but as he turned around and circled and then I heard "that mother fucker, that ugly bitch," and two of the employees standing next to him—I can't recall because I really was not paying any further attention than what I just told you—and they turned around as he was saying this and kind of looked off to the side; . . . .

. . . .

It wasn't too long after that time, my guesstimate somewhere around a week or maybe a little more—I know there was the same people there. It was early in the morning and I was coming into work and Doug was on picket duty because he did have a sign. As I went through, he directed some more abusive language and it was something along that line of "the bitch" or something like that. I can't recall, but it was, again, directed at me.

C. Proceedings Below

The Union filed complaints with the Board alleging, among other things, that the Company violated sections 8(a)(1), (3), and (5), of the National Labor Relations Act, 29 U.S.C.A. §§ 158(a)(1), (3), and (5), by refusing to execute a collective bargaining agreement on which the parties had agreed and by discharging and thereafter failing to reinstate certain employees for alleged misconduct occurring during the strike.[4] At a hearing on these complaints, the administrative law judge (ALJ) found that the parties had not reached an agreement on a new collective bargaining contract, and therefore, the Company had not violated section 8(a)(5) of the Act. The ALJ found that the major impediment to an agreement was the issue of striker discipline. Regarding the December 3 negotiations between Henson and Kelly, the ALJ found that Kelly raised the issue as a contractual proposal. Because Henson refused to discuss this issue, the ALJ found that the parties had failed to reach a meeting of the minds. Finally, the ALJ concluded that the Company did not violate section 8(a)(1) of the Act in discharging Bishop, Hughes, and Barlow because their actions were of sufficient gravity to warrant such discipline.

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4. Title 29 U.S.C.A. § 158(a) provides:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

. . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Contrary to the ALJ, the Board found that a collective bargaining agreement had been reached on December 9 when the Union sent its telegram accepting the Company's last offer. The Board found that the Company did not raise striker discipline as a bargainable issue at the December 3 negotiating session, nor make it a condition to the resolution of an agreement. Interpreting the Company's December 19 "Memorandum of Agreement" as introducing new contingencies in the negotiations in order to buttress its position that no agreement had been reached, the Board found that the Company, by refusing to acknowledge the agreement and assist the Union in reducing the agreement to writing, had obstructed and frustrated the bargaining process. The Board also concluded that the Company violated section 8(a)(1) of the Act in that the actions of Bishop, Hughes, and Barlow were not sufficiently egregious to warrant their discharge.

II. ISSUES

Georgia Kraft's petition raises two issues: (1) whether substantial evidence in the record as a whole supports the Board's finding that Georgia Kraft and the Union reached an agreement on a collective bargaining contract; and (2) whether the Board erred as a matter of law in finding that the actions of Bishop, Hughes, and Barlow did not warrant termination.

III. DISCUSSION

A. Collective Bargaining: Was an Agreement Reached?

Georgia Kraft contends that no agreement was reached via the Union's telegram because of the Union's previous refusal to discuss striker discipline. Further, even if the Union's rejection of the December 3 proposal on striker dis-

cipline is not an obstacle to a collective bargaining agreement, the telegram still fails to constitute an adequate acceptance. Other significant issues such as wages, effective date of the contract, seniority provisions, permanent promotions and transfer provisions, temporary assignments, and temporary vacancies remained unsettled. The Board claims that the evidence of record does not support either of the Company's contentions. According to the Board, the issue of striker discipline was not presented as a negotiable proposal on December 3, nor was it an issue upon which resolution of a collective bargaining agreement was contingent.

The evidence presented to the ALJ on this issue consists only of Kelly's testimony and the parties' stipulation to Henson's testimony. On direct examination, Kelly explained that the reason for giving Henson the list was to "advise [the Union] about the situation with these employees" and "inform [Henson] of the conduct of these people . . . that we intended to terminate." When asked if he wished to bargain over the list of employees, Kelly replied that "the subject was opened [sic] to bargain if [Henson] had some specific request in regard to the people." When asked a second time if he wished to bargain about the list of strikers, Kelly responded:

> No, not specifically. As I gave Mr. Henson that particular piece of paper, his reaction . . . was that he did not want to get involved with the termination of any strikers, and that the International Union was withdrawing from the negotiations. We really didn't discuss that at all. We took that position right off.

Kelly further testified that he gave the list after the parties had discussed each others' proposals, and that he told Henson it was the Company's position that some form of dis-

ciplinary action was justified for the employees on the list.[5] Based on this evidence, the ALJ reasoned that the Company submitted the striker discipline issue as a matter to be resolved by contract. Because the Union refused to discuss the issue, and did not intend to accept any proposal on discipline in the December 9 telegram, the ALJ concluded that no agreement had been reached.

[1, 2] In reviewing an order of the National Labor Relations Board, we are bound by the Board's factual findings if they are supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464-465, 95 L.Ed. 456 (1951); *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 487 (11th Cir.1982). In those cases where the Board does not accept the ALJ's findings, however, this court's examination of the Board's findings must be especially critical. *NLRB v. Datapoint Corp.*, 642 F.2d 123, 126 (5th Cir.1981); *Syncro Corp. v. NLRB*, 597 F.2d 922, 924-25 (5th Cir.1979). "Particular scrutiny is appropriate where the Board disagrees with some of the credibility choices made by the judge who had the opportunity to see and question the witnesses himself." *Datapoint*, 642 F.2d at 126.

[3] Contrary to Georgia Kraft's contentions, the Board did not reject credibility determinations made by the ALJ in this case. *See NLRB v. Ridgeway Trucking Co.*, 622 F.2d 1222, 1224 (5th Cir.1980). *Compare NLRB v. Datapoint Corp.*, 642 F.2d at 126 (differences between Board and ALJ

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5. The parties stipulated that Henson would have testified as follows:

> Kelly said that he did not want to deceive me and handed me another piece of paper . . . with names of people that the Company intended to fire. I told Kelly the meeting was over and I would not discuss anything about firing strikers. At no time during this meeting did Kelly say anything about any other areas that the parties may have discussed before.

rested on both credibility determinations and conclusions of law); *Syncro Corp. v. NLRB,* 597 F.2d at 925 (ALJ possesses superior advantage in evaluating credibility of witnesses' record testimony). Rather, this case involves "a difference in overall judgment as to proper inferences to be drawn from largely undisputed evidence" between the Board and the ALJ. *NLRB v. Florida Medical Center, Inc.,* 576 F.2d 666, 674 (5th Cir.1978). Accordingly, we find that the Board did not discredit Kelly's testimony, but rather rejected the ALJ's conclusions as to the inferences to be drawn from Kelly's testimony and Henson's stipulated testimony. A disagreement between the Board and the ALJ on factual inferences and legal conclusions does not detract from the substantiality of the evidence that must support the Board's decision, nor does it modify the appropriate standard of review in this court. *See Universal Camera,* 340 U.S. at 496, 71 S.Ct. at 468-469.

[4] We agree with the Board that the striker discipline issue was not a bargainable topic in need of resolution before a collective bargaining agreement could be reached. At no point during negotiations did the Company indicate that a new contract was contingent upon resolution of this issue. Although bargainable in the sense that the Company had not decided on the severity of discipline by the December 3 meeting, the uncontroverted evidence reflects that the Company's purpose in raising the matter was to give the Union notice of its proposed action.[6] Be-

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6. Kelly's testimony supports this conclusion. In response to questioning by his counsel on direct examination regarding whether the Company intended to bargain with Henson about the list, Kelly replied:

> Yes, we could have. I told him the title we put at the top of the thing, "People To Be Terminated," but during a meeting when I talked to him, I didn't say the people were absolutely fired and were never going to come back. I said that some disciplinary action is justified.

cause it was never intended to be a contractual provision, striker discipline was not, contrary to the ALJ's holding, an impediment to a collective bargaining agreement.

Finding that the striker discipline issue was injected into the negotiation process on December 3 as a contractual proposal, the ALJ deemed it unnecessary to consider whether other contractual issues remained unresolved. Thus, it was necessary for the Board to examine the contractual proposals outstanding as of the December 3 session to determine whether an agreement was indeed obtainable. The Board concluded that when the Union telegraphed its acceptance on December 9, a binding contract was formed and the Company's notification on December 11 that it was not prepared to execute a collective bargaining agreement constituted a violation of section 8(a)(5) of the Act.

[5] After three months of negotiations, the parties' stance on various contractual issues had become fixed. Thus, by December 3, the Company had specific positions on such issues as seniority, departmental point systems, contract duration, and wages.[7] Barnes testified that, by its December 9 telegram, the Union accepted the most recent Company proposals on undecided issues and withdrew all outstanding proposals of the Union. Therefore, the Board found it necessary to determine initially whether the Company's offers in the disputed areas were still viable as of December 9. *See Pepsi-Cola Bottling Co. v. NLRB,* 659 F.2d 87 (8th Cir. 1981). The Board found that as of December 9, all contractual provisions were the subject of specific proposals and had not been withdrawn prior to the

7. Effective November 19, 1979, the Company implemented the terms of its last economic offer made to the Union, the offer ultimately accepted by the December 9 telegram. This wage offer clearly reflects that the Company contemplated a contract of three years' duration.

Union's December 9 acceptance. That the Union originally rejected proposals is irrelevant. In the collective bargaining setting

> A contract offer is not automatically terminated by the other party's rejection or counterproposal, but may be accepted within a reasonable time unless it was expressly withdrawn prior to acceptance, was expressly made contingent upon some condition subsequent, or was made subject to intervening circumstances which ma[k]e it unfair to hold the offeror to his bargain.

Pepsi-Cola Bottling, 659 F.2d at 89-90 (footnote omitted).

[6, 7] The Board's decision to determine the viability of all proposals was entirely appropriate. Because Barnes' testimony clarified what the Union was accepting, the only remaining question was whether the Company's proposals were still viable. As for the effective date of the new agreement, neither the Company nor the Union sought to disrupt the continuity between the existing contract and the new one. The Company's December 19 "Memorandum of Agreement" calls for an effective date of November 1, 1979, and neither party has objected to this date.[8]

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8. Georgia Kraft argues that the Board's order signifies an effective date of December 9, the Union's acceptance date. We read the order as holding otherwise. The Board stated that

> the record reflects that the old contract expired on October 31, and that, throughout negotiations, neither side had articulated any proposal that would break the continuity between the expired contract and the new one. Indeed, that [the Company] contemplated no such hiatus is obvious from its December 19 "Memorandum of Agreement," which calls for an effective date of November 1.

As indicated earlier, by agreement of the parties, the expiration date of the existing date was extended from November 1 to

(Continued on following page)

[8] Georgia Kraft calls our attention to the fact that the document prepared by the Union and submitted to the Company contains discrepancies from the proposals tabled by the Company and agreed to by the Union on December 9. According to the Company, these discrepancies reinforce the argument that an agreement was never reached. We disagree. The Board has not required the Company to execute the Union's document, but rather a contract embodying the agreement reached between the parties on December 9. The Company is therefore required only to execute an agreement that accurately reflects the most recent proposals accepted by the Union in its December 9 telegram. The Board found discrepancies in the Union's document resulting not from lack of agreement, but due to the Company's refusal to assist the Union in reducing the agreement to writing prior to the resolution of the strike-related issues. We find no error in this ruling. Simply put, the variations between the document as drafted and the December 9 agreement are no defense to the enforcement of the Board's order.

B. *Discharge of Striking Employees*

[9, 10] Economic strikers such as Bishop, Hughes, and Barlow, retain their employee status and, upon an unconditional application to return to work, must be reinstated if former or substantially equivalent positions are available. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378-79, 88 S.Ct. 543, 545-546 (1967); *C.H. Guenther &*

Footnote continued—

November 15, 1979. The Company notified the Union on November 16 that it would implement its new wage proposal on November 19. Despite a counter proposal raised by the Union at the December 3 session, the Union accepted the Company's previously implemented wage scale. To be more accurate, the effective date of the new collective bargaining agreement was November 15, 1979.

Son, Inc. v. NLRB, 427 F.2d 983, 985 (5th Cir.), *cert. denied,* 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 246 (1970). While an employer's refusal to reinstate such employees is deemed presumptively discriminatory, the employer may rebut the presumption by demonstrating that the employee engaged in misconduct during the strike falling outside the protection of the Act. *Associated Grocers of New England v. NLRB,* 562 F.2d 1333, 1335 (1st Cir.1977). Contrary to the ALJ, the Board determined that although Bishop, Hughes, and Barlow had engaged in misconduct during the strike, it was not sufficiently serious to warrant their discharge. In so doing, the Board did not reject the credibility determinations made by the ALJ. Regarding Bishop and Hughes, the Board found the remark about "taking care" of Walker ambiguous and unaccompanied by violence or physical gestures. Because this was an isolated incidence of verbal intimidation, the Board ordered Bishop and Hughes reinstated. The Board ordered similar reinstatement for Barlow based on its determination that his lewd and insulting characterizations directed at Industrial Relations Manager Barbara Lawler were insufficient to warrant discipline. We are mindful that "when there are differing views about the interpretation or significance of undisputed facts, each case must be decided on its particular circumstances, keeping in mind that labor disputes are ordinarily heated affairs . . . ." *Boaz Spinning Co. v. NLRB,* 395 F.2d 512, 514 (5th Cir.1968) (footnote omitted). Moreover, the Board is entitled to considerable deference in determining the scope of protected activity under section 7 of the Act, 29 U.S.C.A. § 157.[9] *NLRB v.*

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9. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C.A. § 157.

Pipefitters Local 638, 429 U.S. 507, 97 S.Ct. 891, 51 L.Ed. 2d 1 (1977); *Associated Grocers,* 562 F.2d 1333, 1336. Reviewing the particular circumstances of this case, we enforce the Board's order reinstating the discharged employees.

LANDIS BISHOP AND JEFFREY HUGHES

[11, 12] Georgia Kraft urges us to reject the Board's standard that verbal threats, short of a direct threat of immediate physical harm, lose the protection of the Act only when accompanied by physical acts or gestures. Instead, the Company advocates the objective standard followed by the First Circuit in *Associated Grocers* and the Third Circuit in *Local 542, Operating Engineers v. NLRB,* 328 F.2d 850 (3d Cir.), *cert. denied,* 379 U.S. 826, 85 S.Ct. 52, 13 L.Ed.2d 35 (1964). In determining when conduct is due the protection of the Act, those circuits consider "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the rights protected under the Act." *Local 542, Operating Engineers,* 328 F.2d at 852-53. *See also, NLRB v. W.C. McQuaide, Inc.,* 552 F.2d 519, 520 (3d Cir. 1977). Although both standards have merit, it is our belief that the Board's standard comports with section 7 of the Act, in protecting strike-related conduct. Tested by the standard of the Board, Bishop and Hughes' verbal threats were not sufficient to justify their termination from employment.

In *NLRB v. Moore Business Forms, Inc.,* 574 F.2d 835, 845 (5th Cir. 1978), a striker was held dischargeable for issuing a threat similar to the one issued by Bishop and Hughes. When a non-striking employee informed a striker that he was working because he had to, the striker

retorted, "there's ways to keep you from it." 574 F.2d at 845. The court denied reinstatement because of this threat. The circumstances surrounding the strike in *Moore Business Forms,* however, were different from those at Georgia Kraft's Greenville plant. In *Moore Business Forms,* the strike was marked by pervasive violence directed not only at company and personal property, but toward persons as well. The evidence before the ALJ in this case indicates that although the Greenville strike was not immune from violence, the acts were directed only at company property. We find this evidence sufficient to provide a basis by which to distinguish *Moore Business Forms.*

PRESTON BARLOW

[13] We agree with the Board that Barlow's crude and obscene remarks directed at a female management executive as she crossed the picket line did not warrant his termination. Verbal obscenities which accompany threats of physical harm constitute serious misconduct and are not protected by the Act. *See e.g., Firestone Tire & Rubber Co. v. NLRB,* 449 F.2d 511, 512 (5th Cir.1971). Name-calling, however, without more, is privileged under the free speech provisions of section 8(c) of the Act, 29 U.S.C.A. § 158(c).[10] The order reinstating Barlow as an employee of Georgia Kraft is enforced.

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10. This section provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C.A. § 158(c).

IV. CONCLUSION

As hereinabove set forth, the order of the Board is enforced.

ENFORCED.

CLARK, Circuit Judge, concurring in part and dissenting in part:

My dissent is limited to that part of the majority opinion enforcing the NLRB order that reinstates Landis Bishop and Jeffrey Hughes. The testimony cited at note 2 of the majority opinion and the record reflect that Bishop and Hughes went to Walker's house and addressed him at the doorway. I take the language "yeah, we'll take care of you" as a threat, given the context of the conversation. I refuse to join in sanctioning strike-related conduct that can generate fear in a person when he is standing in the door of his home.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7852

GEORGIA KRAFT COMPANY,
WOODKRAFT DIVISION,
Petitioner, Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent, Cross-Petitioner.

ON PETITION FOR REVIEW AND CROSS APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 24, 11 Cir., 1983, ... F.2d ....)

(Filed April 8, 1983)

Before

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ (Illegible)
United States Circuit Judge

258 NLRB No. 121 D—8189

Greenville, GA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 10-CA-15289,
10-CA-15293, and
10-CA-15564

GEORGIA KRAFT COMPANY,
WOODKRAFT DIVISION

and

LABORERS' LOCAL UNION NO. 246

DECISION AND ORDER

On December 18, 1980, Administrative Law Judge Howard I. Grossman issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and Respondent filed a reply brief to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions[1]

1. In the absence of exceptions, we adopt, *pro forma*, the Administrative Law Judge's dismissal of certain allegations that Respondent violated Sec. 8(a)(1) of the Act.

of the Administrative Law Judge but only to the extent consistent herewith.

The Administrative Law Judge found, *inter alia*, that Respondent violated Section 8(a)(5) of the Act by bargaining to impasse with respect to certain nonmandatory subjects of bargaining; and that certain of the striking employees did not engage in strike misconduct, so that Respondent violated Section 8(a)(1) of the Act by suspending and discharging them.

Respondent excepts, *inter alia*, to the Administrative Law Judge's finding that it bargained to impasse in violation of Section 8(a)(5) of the Act. The General Counsel excepts to the Administrative Law Judge's finding that the parties herein did not reach agreement on a contract, and thus to his conclusion that Respondent did not violate Section 8(a)(5) of the Act by failing and refusing to execute the agreed-upon contract. The General Counsel also excepts, *inter alia*, to the Administrative Law Judge's finding that Landis Bishop, Jeffrey A. Hughes, and Preston Barlow engaged in strike misconduct sufficient to warrant their termination.

For the reasons set out below, we find merit to the above contentions of the General Counsel.

1. The record reflects that the Union was certified as the statutory representative of Respondent's production and maintenance employees on September 30, 1977, and that the parties thereafter entered into a collective-bargaining agreement effective January 1, 1978, through October 31, 1979. In July 1979, the Union notified Respondent of its wish to modify and renegotiate the terms of the agreement. The parties began negotiating on September 11, 1979, and it is undisputed that there were still some issues outstanding at the close of the fourth negotiating

session.[2] The principal negotiators during the first 4 sessions were Charles R. Barnes representing the Union, and Broughton Kelly representing Respondent. At the fifth bargaining session, on November 29, Howard Henson, a regional manager for the International Union substituted for Barnes in an effort to aid the bargaining process. In spite of Henson's presence, no significant progress was made that day.

Thereafter, on December 3, Henson and Kelly met again. At this session, Kelly presented a new seniority proposal, which specifically concerned lines of progression for unit employee promotions, as well as the procedure to be followed in the event of a reduction in force. Henson, not having the authority to make specific concession on behalf of the Union, stated that he would pass the seniority proposal along to the Union's negotiating committee. In addition, it was at this meeting that the subject of the possible discharge of certain striking employees was first broached by Kelly. There was no agreement on a contract by the close of the December 3 meeting, but on December 9, the Union sent a telegram to Respondent which read as follows:

> THIS IS TO ADVISE YOU THAT THE LAST COMPANY OFFER PRESENTED ON DECEMBER 3, 1979, HAS BEEN ACCEPTED AS A FINAL AND BINDING CONTRACT ALL EMPLOYEES WHO COULD BE CONTACTED WILL RETURN BACK TO WORK ON THEIR REGULARLY ASSIGNED SHIFTS EF-

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2. Unless otherwise indicated, all dates hereinafter refer to 1979. The dates of the four sessions were September 11 and November 6, 14, and 27. By agreement of the parties, the contract was extended to November 15, and, when agreement had not been reached by that date, Respondent's employees engaged in an economic strike which continued until December 10, when the strikers reported to work.

FECTIVE DECEMBER 10, 1979 WE ARE PREPARED TO MEET AT YOUR CONVENIENCE TO SIGN THE AGREEMENT

As promised by the telegram, the strike ended on December 10, and the striking employees reported to work.

In reviewing the evidence, the Administrative Law Judge characterized the December 3 meeting as follows:

> Kelly's testimony shows that he wished to bargain with the Union about discipline of the strikers, and that the Company may have reconsidered the matter and may have contemplated discipline less than discharge. If not, the Company sought Union agreement to the discharges. Henson's stipulated testimony that he would not discuss the firing of strikers suggests that Kelly wished to bargain about the matter and Henson did not. It is obvious that the Company made a "proposal" at the December 3 negotiating session, involving Union agreement to discipline of strikers, and that the Union refused to discuss the matter. [ALJD, sec. III,A,2, par. 2.]

Based on the above-cited characterization of the record evidence,[3] and upon his finding that the Union did not, by its December 9 telegram, intend to accept Respondent's "proposal" on striker discipline, as well as upon his assumption that the "proposal" as to striker discipline was part and parcel of the ongoing contract negotiations, the Administrative Law Judge concluded that there was "no meeting of the minds," and thus no agreement which Re-

3. Although the Administrative Law Judge also characterized Barnes' testimony on this issue as "unpersuasive," we note in passing that Barnes' testimony as to what transpired at the December 3 meeting is, in large part, irrelevant, since Barnes was not present when the alleged "proposal" was made.

spondent could legally be required to execute. Finally, and having decided that it was the issue of striker discipline that was the obstacle to agreement, the Administrative Law Judge determined that it was therefore "unnecessary to consider the myriad of other issues which the Company contends were unresolved." (ALJD, sec. III,A,2, par. 3.)

Contrary to the Administrative Law Judge, however, a review of the record plainly reflects that the issue of striker discipline was not, on December 3, presented by Respondent as a bargainable proposal, nor was it put forth on the date as a *quid pro quo* for agreement on a contract. Thus, it was unnecessary for the Administrative Law Judge to speculate as to what Henson's stipulated testimony "suggests," nor is it "obvious" that the issue of striker reinstatement was a bargainable "proposal" on December 3. Kelly was initially examined on this subject, as an adverse witness called by the General Counsel:

> Q. Whose idea was it, Mr. Kelly, to give Mr. Henson . . . a list of strikers to be fired?
>
> A. Mine.
>
> Q. Do you want to explain for us any reason that you had for doing it at that time as opposed to any other?
>
> A. No, no, just that we had the meeting scheduled with Mr. Henson that particular day, and we thought—I thought we should advise them about the situation with these employees.
>
> Q. Is it your testimony that you wanted to bargain with Mr. Henson regarding the company's desire to fire strikers; was that the purpose of giving him . . . [the list]?

A. The purpose was to inform him of the conduct of these people and that we intended to terminate.

Q. And my question, I think, was a little broader. You're a person, I think, who was engaged in the negotiating session. Did you wish to bargain with Mr. Henson concerning that piece of paper?

A. The subject was opened to bargain if he had some specific request in regard to the people.

Q. Did you inform Mr. Henson that you wished to negotiate or bargain about it? "About it," I'm talking about [the list of strikers]?

A. No, not specifically. As I gave Mr. Henson that particular piece of paper, his reaction was that he —his statement was that he did not want to get involved with the termination of any strikers, and that the International Union was withdrawing from the negotiations. We really didn't discuss that at all. We took that position right off.

The following testimony was adduced on direct examination of Kelly:

A. I gave [Henson] the list at the end of the meeting after we had discussed each other's proposals. I gave him the list of the people we had observed in misconduct and it had the title at the top of it, People To Be Terminated for Misconduct. I told him we thought the conduct of these people was such that some disciplinary action was justified. When I gave him the list, he said something to the effect that he didn't want to be involved in the thing that we were planning on firing a lot of people and that the International Union was going to withdraw from the

negotiations and that it would be between the company and the Local Union from then on.

Q. Now this list of strikers that you presented to him, had the decision been made at that time to discharge those strikers?

A. No, not on December 3rd.

Q. What was your purpose for submitting that proposal to him?

A. Well, we really hadn't communicated at all to the Union about the misconduct as far as any disciplinary action was involved and it seemed to me that we ought to get on board or get on record with them that we had some—not charges, but we had observed these people doing things we thought were wrong and that something should be done about it. We had not talked to anyone about this until that particular time. So that is why I gave him the list.

Finally, and contrary to the Administrative Law Judge, a review of Henson's stipulated testimony likewise supports a finding that the list of strikers whom Respondent believed to have engaged in misconduct was not proffered by Respondent on December 3 as part of a "package deal" which the Union would have to accept in order to "get" a contract. The stipulation reads, in relevant part, as follows:

> Kelly handed me 2 or 3 sheets of handwritten paper with the company's proposal on seniority and classification . . . .
>
> I said I was not in a position to negotiate it but that I would take it back to the committee.
>
> Kelly said that he did not want to deceive me and handed me another piece of paper . . . with names of

> people that the company intended to fire. I told Kelly the meeting was over and I would not discuss anything about firing strikers. At no time during this meeting did Kelly say anything about any other areas that the parties may have discussed before. [G.C. Exh. 31.]

As is clear from the evidence presented by both parties, Respondent did not, at this juncture in the negotiations, present the issue of discipline of certain strikers as a proposal to be considered in conjunction with any of the then outstanding contractual issues. Thus, Kelly admitted under examination by counsel for the General Counsel that he did not inform Henson that he wished to negotiate or bargain about the list of strikers; and on direct examination Kelly revealed that his purpose was merely to "get on record" with the Union by letting its representative know that Respondent considered that form of discipline to be appropriate with respect to certain striking employees.[4] Accordingly, the discussion on December 3 with respect to the issue of striker discipline, did not, under the circumstances herein, signify a change in Respondent's "bot-

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4. The record does reflect that Kelly was asked by his counsel on direct examination:

> Q. Did you intend to bargain with Mr. Henson about the list?
>
> A. Yes, we could have. I told him the title we put at the top of the thing, "People To Be Terminated," but during a meeting when I talked to him, I didn't say the people were absolutely fired and were never going to come back. I said that some disciplinary action is justified.

It is plain, however that both the question and the answer are in the nature of conjecture, and thus not reflective of what actually transpired at the December 3 session. Likewise, the Administrative Law Judge's statement that "Kelly's testimony shows that he wished to bargain with the Union about the discipline of strikers," is not a realistic reflection of the events of December 3. In addition, the Administrative Law Judge's reliance on what Kelly may have "wished" is neither relevant to, nor probative of, what actually occurred.

tom line" as to what it considered necessary to reach agreement on a contract.

Having concluded that the issue of striker discipline was not injected into the negotiation process on December 3 as a contract proposal, we find it necessary, unlike the Administrative Law Judge, "to consider the myriad of other issues which the Company contends were unresolved." For the reasons fully set out below, we find that agreement on a contract was reached when the Union sent its December 9 telegram, and that Respondent thereby violated Section 8(a)(5) of the Act on and after December 11,[5] when it notified the Union that it was not prepared to execute a collective-bargaining agreement.[6]

As noted above, the parties met on four occasions prior to December 3; and the record reflects that, by the close of the November 27 session, Respondent had made known its position on all sections of the contract with

5. Accordingly, and contrary to the Administrative Law Judge, we find it unnecessary to consider whether or not Respondent bargained to impasse on nonmandatory subjects of bargaining.

6. Respondent's December 11 letter states in pertinent part:

> There are several matters that we must resolve before we will have an agreement on a complete contract, but I am encouraged from your telegram that we can reach a complete agreement in one more meeting. We also need to work out an understanding on how we will handle those employees who have been replaced but would still like to return to work when an opening becomes available. Lastly, I believe we should resolve the pending lawsuit and what is to be done with those employees who have engaged in misconduct during the strike. [G.C. Exh. 21.]

We note in passing that Respondent's letter confirms the fact that, as of December 11, Respondent had not "tied" agreement on a contract to the discipline of strikers. Thus, although the issue of striker discipline is mentioned, it is clearly within the context of pointing out the need for a strategy to smooth the way for a return to "business as usual" in the event the contract was settled to Respondent's satisfaction.

the exception of article 5, "Seniority." On November 6, Respondent had presented an initial modification of that article, and then on December 3, submitted a further modification which the Union accepted on December 9, along with all other of Respondent's proposals then "on the table." Nonetheless, Respondent claims that, at the time of the December 9 telegram, there were still issues not agreed upon, to wit: wages, contract duration, effective date, and the portion of article 23 dealing with Respondent's "Point System." It was these issues, in addition to the discipline of certain strikers and other strike-related issues, which Respondent memorialized in its proposed "Memorandum of Agreement" presented to the Union on December 19. Leaving aside, for the moment, the strike-related issues, the record is plain that all contractual issues set out in the December 19 memorandum had been previously submitted to the Union at various points during the bargaining process. Thus, on November 16, Respondent communicated to its employees the wage offer already presented to the Union; and, in addition, that wage offer clearly reflects that Respondent contemplated a contract of 3 years' duration.[7] Respondent's "Point System" offer was submitted to the Union at the November 6 negotiating session. Finally, the record is devoid of any indication that the wage, duration and "Point System" offers were either withdrawn prior to acceptance by the Union, or were, prior to December 9, somehow made contingent or conditional upon some other aspect of bargaining. With respect to the issue of the effective date of the contract, which Respondent claims had not been agreed to, the record reflects that the old contract expired on October 31, and that, throughout

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7. The record also reflects that Respondent implemented the economic terms of its "final offer" and so informed the Union by letter of November 16.

negotiations, neither side had articulated any proposal that would break the continuity between the expired contract and the new one. Indeed, that Respondent contemplated no such hiatus is obvious from its December 19 "Memorandum of Agreement," which calls for an effective date of November 1.

In spite of the record evidence, Respondent insists that these contractual issues reflected areas of disagreement. It seems to us, however, given the state of the record, that our analysis should initially proceed, not on the basis of whether or not the parties were in agreement with respect to these issues, but rather with the question of whether Respondent's offers in these areas were still viable as of December 9, when the Union sent its telegram. The Board has, in the recent past, had occasion to consider the question of under what circumstances an offer made during bargaining remains viable. In *Pepsi-Cola Bottling Company of Mason City, Iowa,* 251 NLRB 187, 189 (1980), the Administrative Law Judge stated, with Board approval, that:

> [A] complete package proposal made on behalf of either party through negotiations remains viable, and upon acceptance *in toto* must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance, or defeased by an event upon which the offer was expressly made contingent at a time prior to acceptance. Respondent in the instant case took no such steps and when the Union abandoned all collateral demands, and elected to accept this complete package, a binding agreement was consumate [sic].

Similarly, in the case herein, all outstanding contractual issues were the subjects of specific proposals which, as noted above, had not, prior to December 9, been

withdrawn or otherwise made contingent on some other event. Thus, all proposals with respect to the areas of alleged disagreement remained viable, were available for acceptance, and were, in fact, agreed to by the Union's December 9 telegram. As discussed above, and contrary to the Administrative Law Judge, the record reflects, and we find, that resolution of the contractual issues was not, on December 3, made contingent upon resolution of the strike-related issues. Respondent, however, by its December 19, "Memorandum of Agreement," attempted to construct just such a contingency. Thus, even though the Union had capitulated on all outstanding issues as of December 9, Respondent nonetheless resurrected—unaltered—proposals which had been "on the table" and agreed to by the Union, made them contingent on the strike-related issues, and then claimed that there was no "meeting of the minds." Although refusal to execute an agreed-upon contract is more in the nature of a *per se* violation in that proof of bad faith is not necessarily required, we nonetheless observe that Respondent's above-described actions are demonstrative of the vacuity of its arguments that no agreement was reached.

In finding, as we do, that the parties reached agreement on a contract on December 9, and that Respondent unlawfully refused to execute that contract on December 11, and thereafter, we concede that bargaining herein was not a model of neatness and organization. Thus, the record shows that, although the Union's initial proposed changes were contained within a single document, Respondent chose to respond to the Union's proposal in a piecemeal fashion, presented in "dribs and drabs," sometimes typewritten, sometimes handwritten. This style of bargaining, we note, has made reconstruction of events somewhat difficult, but not impossible; and we wish to emphasize

that our review of the documents herein leaves no doubt that, with respect to all areas which Respondent claims were still in dispute, Respondent had already submitted proposals which it had not withdrawn or on which it had otherwise placed conditions. We therefore conclude that as of December 9, when the Union telegraphed its acceptance of the remaining outstanding proposals, that there was a "meeting of the minds" and agreement on a contract.

As of December 9, and pursuant to Section 8(d) of the National Labor Relations Act, as amended, Respondent was clearly obligated to assist the Union in reducing the agreement to writing and to thereupon execute such agreement. See, generally, *Kennebec Beverage Co., Inc.*, 248 NLRB 1298 (1980), and cases cited therein. The record reflects, however, that, when the Union requested such assistance on December 11,[8] Respondent countered with its December 11 letter, already set out in footnote 6, *supra*, which took issue with the Union's position that agreement had been reached, and then sought to buttress that position by means of its December 19 "Memorandum of Agreement," which introduced new contingencies. Subsequent to the December 19 meeting, a good bit of correspondence passed between the parties: the Union claiming that agreement had been reached, and Respondent claiming quite the opposite. Then, on March 3, 1980, Respondent again "took issue" with the Union's position that agreement had been reached, and wrongly placed upon the Union the burden of reducing any such agreement to writing. Thereafter, on March 12, 1980, the

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8. The Union's letter states:

A telegram sent to your office dated December 9, 1979 informed you that the last Company offer presented to the Union had been accepted as a final and binding contract. We ask that you contact the undersigned as soon as possible to set a meeting to finalize the language and sign the Agreement.

Union nonetheless notified Respondent that it had reduced the agreement to writing; but Respondent's March 14 reply referred to an "alleged" agreement, and clearly stated that it would only agree to "review" any such writing. The correspondence continued in the same vein until July 1980, when, on July 11, and just prior to the hearing in this matter, the Union sent Respondent a "writing" of the December 9 agreement.

A review of this document reflects some minor deviation from the proposals submitted by Respondent, and agreed to by the Union on December 9.[9] We nonetheless conclude that any such deviation is not indicative

9. The "writing" referred to is G.C. Exh. 34, and the "deviations" are as follows:

The first paragraph of art. 5, sec. 2,A, p. 4, is apparently inconsistent with the Union's acceptance of Respondent's December 3 proposal, to include the third paragraph in that subsection. In any event, the record is clear that the Union unequivocally accepted Respondent's December 3 "Seniority" proposal. We note that the "offending" first paragraph was part of an initial proposal submitted by Respondent on November 6.

Art. 5, sec. 2,B, subpar. 2, p. 5, omits the following sentence:

> Employees' shift will be changed only after attempts have been exhausted to fill the position from employees on the shift where the vacancy exists.

This sentence appears in Resp. Exh. 19, submitted by Respondent on November 6.

Art. 23 reflects the correct percentage wage increase, but neglects to translate that percentage into a "dollars/hour" rate.

Art. 23, sec. 3, represents a written proposal submitted by Respondent (Resp. Exh. 23(a)—(c)) but which Respondent did not wish to incorporate into a written contract. The issue of whether or not to reduce an agreed-upon provision to writing, however, is not the sort of failure to agree which would preclude our finding a "meeting of the minds." Thus, if a party insists, an agreed-upon provision must be reduced to writing. See, generally, *Amalgamated Clothing Workers of America, AFL-CIO [Henry I. Siegel Co., Inc.] v. N.L.R.B.*, 324 F.2d 228 (2d Cir. 1963).

Thus, it appears that of the four "inconsistencies" noted above, only the omission of the sentence from p. 5 of G.C. Exh. 34 has no apparent explanation.

of a lack of agreement between the parties, but is rather the result of Respondent's own refusal to acknowledge the existence of an agreement, as well as its refusal to assist the Union in reducing the agreement to writing, and it is this conduct, to wit: Respondent's obstruction and frustration of the bargaining process after agreement was reached, that we find to be unlawful.[10]

Accordingly, and based on all of the above, we find that an agreement on a contract was reached on December 9, and that Respondent violated Section 8(a)(5) of the Act on December 11, and thereafter, when it failed and refused to execute the agreed upon contract.

2. As noted above, General Counsel excepts, *inter alia*, to Administrative Law Judge's conclusions that employees

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10. Indeed, we have already set out the facts herein which plainly show that agreement was achieved. We find *Trojan Steel Corporation*, 222 NLRB 478 (1976), enfd. 551 F.2d 308 (4th Cir. 1977), to be particularly relevant to the facts herein.
In *Trojan Steel*, the company, like Respondent herein, submitted its proposals "piecemeal"; and also, upon the union's request, refused to assist in reducing any agreement to writing. When that union finally collated the separate proposals, pieced together a final document, and then submitted it to the company, the company thereupon refused to execute the document, claiming massive variations from what had been agreed to. The Administrative Law Judge, comparing the "writing" with the numerous and separate proposals, found only three deviations, and also found that, with respect to these particular issues, the record was clear that there had in fact been agreement with the company's position in all disputed areas. The company argued that the agreements made had no bearing on the case, and that the Board could only consider the writing submitted by the union to determine whether there had, in fact, been a meeting of the minds. The Administrative Law Judge, with Board approval, concluding that adopting the company's position would exalt form over substance, found that the parties did, in fact, reach agreement. The facts of the case herein differ from those of *Trojan Steel* insofar as Respondent does not now claim that the writing submitted by the Union on July 11, 1980, is evidence of a lack of agreement. Nonetheless, the document is before us, and, as noted above, any inconsistencies in that document *vis-a-vis* the agreement reached on December 9, can be attributed to Respondent's unlawful frustration of the bargaining process.

Landis Bishop, Jeffrey A. Hughes, and Preston Barlow were lawfully discharged for having engaged in strike misconduct.

With respect to Bishop and Hughes, the Administrative Law Judge credited the testimony of William Walker, an employee who chose not to strike and who was also visited, at home, by Bishop and Hughes. The Administrative Law Judge found that Bishop and Hughes stood outside an open glass door, with a screen door remaining closed. Walker's pregnant wife and young daughter were present. Walker testified that Bishop and Hughes were drunk, cursed, and said that he, Walker, was "screwing them out of their . . . damn money" by working during the strike. Walker also testified that Bishop said that he would "take care" of Walker if he returned to work—a statement repeated by Hughes. Finally, the Administrative Law Judge found that Walker asked them to leave early in the conversation, but that they "took their time doing so."

Contrary to the Administrative Law Judge, and in accordance with our Decision in *MP Industries, Inc.*, 227 NLRB 1709, 1710-11 (1977), we conclude that the actions of Bishop and Hughes constitute an isolated incident of verbal intimidation not sufficiently serious to warrant their discharge. Their remark about "taking care" of Walker was ambiguous, and it was unaccompanied by violence or physical gestures.[11]

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11. The facts in *MP* are remarkably similar to the case herein. Thus, in *MP*, pickets Barrows and Walther followed strike replacement Debbie Whitworth to her house, in Walther's car. A conversation took place when the strikers reached Whitworth's home, during which Barrows and Walther told Whitworth, "You had better watch it Debbie. We know where you live." By contrast, two of the cases cited by the Administrative Law Judge in support of his finding of misconduct are inapposite to the facts herein. Thus, *Otsego Ski-Club-Hidden Valley, Inc.*,

(Continued on following page)

With respect to Barlow, the Administrative Law Judge credited the testimony of Industrial Relations Manager Barbara Lawler that, as she was crossing the picket line, she heard Barlow refer to her as "that f--- bitch," and that "mother f---, that ugly bitch." The Administrative Law Judge also found that Barlow called Lawler a "bitch" on another occasion. Based on these facts, the Administra-

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Footnote continued—

217 NLRB 408 (1975), concerned, *inter alia*, an employee, who, while on the picket line with other strikers, approached an automobile, struck a picket sign through the open window on the passenger side of the car, and threatened the driver with physical harm. The Board, Member Fanning dissenting, found the employee's misconduct sufficiently egregious to warrant his discharge. By contrast, and as noted above, the statements made by the strikers Bishop and Hughes were ambiguous, and did not evidence a purpose to inflict physical harm or engage in any other foul play. Finally, neither Bishop nor Hughes accompanied their words with any gestures—threatening or otherwise.

In light of his dissent in *Otsego*, Member Fanning finds it unnecessary to distinguish that case.

In *Daniel A. Donovan, et al., d/b/a New Fairview Hall Convalescent Home*, 206 NLRB 688, 750-751 (1973), all the employees engaging in the "home visits," with the exception of one employee, also engaged in acts of physical violence and other serious misconduct at various times during the course of the strike; and it was the totality of this conduct which the Administrative Law Judge and Board considered in finding that discharge was warranted. By contrast, and as set out above, neither Bishop nor Hughes engaged in acts, or even threats, of violence. With regard to the one employee in *New Fairview Hall* whose only misconduct was engaging in a "home visit," the Board reversed that Administrative Law Judge, and found respondent's refusal to reinstate the employee to be unlawful.

Finally, the Administrative Law Judge cited *N.L.R.B. v. Syncro Corporation*, 597 F.2d 922 (5th Cir. 1979), denying enforcement 234 NLRB 550 (1978), which, like the other two cases cited by him, is factually inapposite. Thus, in *Syncro*, the alleged employee threat to slash the tires of another employee was not made in the context of a strike; and, in addition, the issue was whether the asserted reason for the employee's discharge was a pretext or the real reason. Here, there is no question as to the reason for the discharges and the only issue is whether the misconduct was sufficiently serious to remove the employees from the protections of the Act. See the discussion of the Barlow, discharge, *infra*.

tive Law Judge concluded that Barlow's conduct was sufficiently "insulting and abusive" to warrant his discharge, and cited several cases in support of his conclusion.[12] Upon a consideration of the facts herein, as well as the applicable law, we conclude that Barlow's actions on the picket line in directing lewd and insulting characterizations at Lawler, were not sufficiently egregious to warrant discipline. In so concluding, we note that each and every case cited by the Administrative Law Judge in support of his conclusion occurred within the context of the workplace, and not, as here, on the picket line. In relying on these cases, the Administrative Law Judge overlooked the well-established principle that "not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act. Thus, absent violence, the Board and the courts have held that a picket is not disqualified from reinstatement despite participation in various incidents of misconduct which include using obscene language . . . ." *Coronet Casuals, Inc.*, 207 NLRB 304 (1973).

In this regard, our holding in *Robbins Company*, 233 NLRB 549 (1977), has application to the facts we now consider. In *Robbins*, an employee made crude obscene remarks and suggestions regarding sex, and directed these remarks to a female cost accountant supervisor, although we do not necessarily view gender as being relevant, as she crossed the picket line. The Administrative Law Judge in *Robbins*, with Board aproval, stated that:

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12. The cases cited by the Administrative Law Judge are: *Rockland Chrysler Plymouth, Inc.*, 209 NLRB 1045 (1974); *Atlantic Steel Company*, 245 NLRB 814 (1979); *Veeder-Root Company, Altoona Division*, 192 NLRB 973 (1971); and *Mueller Brass Company, a subsidiary of U. V. Industries, Inc. v. N.L.R.B.*, 544 F.2d 815 (5th Cir. 1977), denying enforcement 220 NLRB 1127 (1975).

> The language used to express disapproval of persons crossing picket lines seldom comports with the standards of ordinary discourse. While profane epithets which accompany and form an integral part of terroistic tactics are not protected, the Board has long viewed name-calling, without more, privileged under the free-speech provisions of 8(c).[13]

Based on the above, we hold that Barlow's actions on the picket line did not warrant discharge by Respondent herein.

Finally, and under the circumstances herein, it is unnecessary for us to find that the discharge of certain of Respondent's employees for allegedly having engaged in strike misconduct violated Section 8(a)(3), since the Administrative Law Judge has already found, and we concur, that such discharges violated Section 8(a)(1) of the Act. See, generally, *General Telephone Company of Michigan*, 251 NLRB 737 (1980).

Amended Remedy

We adopt and incorporate herein the provisions of "The Remedy" section of the Administrative Law Judge's Decision with the following modifications. First, we hereby modify paragraphs 2 and 3 to include employees Landis Bishop, Jeffrey A. Hughes, and Preston Barlow.[14]

We also modify paragraph 4 to the extent that the employment records of Clarence Watson and Wiley Shepherd shall be credited with working time from such date as it may be determined that, absent the discrimina-

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13. 233 NLRB 549, 557 (1977).

14. In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

tion against them, they would have been reinstated to their prior jobs or substantially equivalent ones, prior to the time they returned to employment with Respondent.

Finally, we modify paragraph 6 of the Administrative Law Judge's recommended remedy to reflect that we have found Respondent to be in violation of Section 8(a)(5) of the Act by refusing to execute a collective-bargaining agreement previously agreed upon, and shall order Respondent, upon request by the Union, to forthwith execute the contract upon which agreement was reached on December 9, 1979.[15]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Georgia Kraft Company, Woodcraft Division, Greenville, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling its employees that the grievance procedure as provided for by the expired contract no longer exists.

(b) Suspending, discharging, or otherwise disciplining striking employees for alleged misconduct in which they have not engaged.

(c) Discharging unreinstated strikers for their refusal to accept jobs which are not substantially equivalent to their former jobs.

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15. Since Respondent has engaged in unfair labor practices of a sufficiently egregious nature as to demonstrate a disregard for employees' fundamental statutory rights, we shall include in our Order a provision requiring Respondent to cease and desist from in any other manner infringing upon the rights guaranteed to its employees by Section 7 of the Act. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

(d) Failing and refusing to pay accrued vacation pay to striking employees who are entitled to same.

(e) Refusing to bargain in good faith with Laborers' Local Union No. 246 by refusing to execute an agreed-upon contract.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Pay each of the following listed employees backpay from December 10, 1979, until such time as he or she returned to employment with Respondent, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy," as amended in this Decision and Order, and credit the employment record of each such employee, for such period, with working time for seniority and vacation purposes:

Kenneth V. Palmer
James Kelly
Mary Burth
Eulice Favors
Yvonne Blalock
Robin O. Boudrie
Donald Ray Thrash
Phillip J. Faulkner
Jerry Kirbo
Robert Barry McCoy
Cecil Barber
James O'Neal
Michael W. Buttram
Stephen C. Smith
Charles Brown
John Ward
Anthony Crouch
Carlene Frost
Joseph M. Williams
Robert L. Russell
Landis Bishop
Jeffrey A. Hughes
Preston Barlow

(b) Prepare and submit to the Regional Director for Region 10 a reconstructed daily record of available jobs and names of incumbents holding such positions including the date of their hire and vacancies, if any, for the period from December 20, 1979, until such time as Clarence Watson and Wiley Shepherd returned to employment with Respondent. In the event that such reconstructed record shows that the same job held by Watson or Shepherd, or a substantially equivalent one, became available prior to the time each employee was rehired, make him whole for any loss of pay and other benefits he may have suffered, with interest, by reason of Respondent's unlawful discharge of him, and credit the employment record of each such employee with working time for seniority and vacation purposes, in accordance with the Administrative Law Judge's Decision entitled "The Remedy," as amended in this Decision and Order.

(c) Make whole Carlene Frost and Mary Burth by paying each of them 2 weeks' vacation pay for 1979, to the extent that they have not already received same, with interest as set forth in the Administrative Law Judge's Decision entitled "The Remedy."

(d) Upon request by Laborers' Local Union No. 246, execute forthwith the contract upon which agreement was reached with the Union on December 9, 1979, completed copies of which shall be furnished by the Union.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order, and the amount of backpay due.

(f) Post at its plant at Greenville, Georgia, copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of the consolidated complaints not specifically found herein be, and they hereby are, dismissed.

Dated, Washington, D.C. September 30, 1981

....

John H. Fanning, Member

....

Howard Jenkins, Jr. Member

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Don A. Zimmerman, Member

(Seal) National Labor Relations Board

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16. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
ATLANTA, GEORGIA

Cases 10-CA-15289
10-CA-15293
10-CA-15564

GEORGIA KRAFT COMPANY
WOODCRAFT DIVISION[1]

and

LABORERS' LOCAL UNION NO. 246

Robert G. Levy, II, Esq., for the General Counsel.

J. Roy Weathersby, Esq., and

John N. Raudabaugh, Esq., (Powell, Goldstein, Frazer & Murphy) for the Company.

Mr. Charles R. Barnes, for the Union.

DECISION

Statement of the Case

HOWARD I. GROSSMAN, Administrative Law Judge: This case was tried in Newnan, Georgia, on July 14 through

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1. The formal papers in Cases 10-CA-15289 and 10-CA-15293 state the Company's names as "Woodcraft Division/Georgia Kraft Company", while the charge in Case 10-CA-15564 gives the name indicated above. Although the second complaint uses both names, the contract between the Company and the Union shows the above-captioned name to be correct (G.C. Exh. 2).

18, 1980. The charge in Case 10-CA-15289 was filed on December 12, 1979, and the charge in Case 10-CA-15293 on December 14, 1979, by Laborers' Local Union No. 246 (herein the Union). An amended charge in Case 10-CA-15293 was filed by the Union on January 7, 1980, and a second amended charge on January 29, 1980. An order consolidating cases and complaint (herein the first complaint) were issued on February 4, 1980. The charge in Case 10-CA-15564 was filed by the Union on March 4, 1980, and a complaint (herein the second complaint) and an order consolidating cases were issued on April 18, 1980.

The complaints allege that Georgia Kraft Company/Woodcraft Division[2] (herein the Company) violated Section 8(a)(1) of the National Labor Relations Act (herein the Act) by (1) interrogating its employees concerning their Union sympathies and activities; (2) telling them that (a) they could not file grievances, (b) they could no longer have a Union steward present at disciplinary interviews because the Union no longer existed, (c) there was nothing they could do about written warnings because there was no union and no contract, (d) the Company would not sign a contract with the Union, and (e) the Company would bypass the Union in processing employee grievances; (3) denying an employee's request for Union representation during interviews which the employee had reasonable cause to believe would result in disciplinary action; (4) conducting such interviews notwithstanding its refusal to permit such representation; and (5) discharging and thereafter failing to reinstate an employee as a result of such interviews.

The complaints also allege that the Company violated Section 8(a)(3) and (1) of the Act by discharging and thereafter failing to reinstate 28 named employees, and by

2. *Ibid.*

refusing to pay accrued vacation pay to two of them, because said employees engaged in concerted activities for mutual aid and protection.

Finally, the complaint in Cases 10-CA-15289 and 10-CA-15293 alleges that the Company violated Section 8(a)(5) and (1) of the Act by refusing to execute a collective-bargaining agreement to which the parties had agreed.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs from the General Counsel and the Company, I make the following:

Findings of Fact

I. Jurisdiction

The Company is a Delaware corporation with an office and place of business at Greenville, Georgia, where it is engaged in the operation of a lumber mill. During calendar year 1979, which period is representative of all times material herein, the Company sold and shipped from its Greenville, Georgia, facility finished products valued in excess of $50,000 directly to customers located outside the State of Georgia. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Company admits, and I find, that the Union is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. *The Alleged Violation of Section 8(a)(5)*

1. *The Bargaining History and Intervening Strike*

The Union was certified as the representative of the Company's production and maintenance employees on September 30, 1977, and the parties thereafter entered into a collective-bargaining agreement effective from January 1, 1978, until October 31, 1979. In July 1979, the Union timely notified the Company that it wished to modify and renegotiate the terms of the agreement.

The first negotiating session was held on September 11, 1979, the principal representatives being Charles R. Barnes for the Union and Broughton Kelly for the Company. The parties made proposals on a variety of subjects, but had not reached agreement by October 31, the end of the contract term. By agreement of the parties, the contract was extended to November 15, 1979, but the parties had still not reached agreement, and on that date the Union called a strike. According to Union Representative Barnes, the parties had reached "final positions" on a number of issues in meetings on November 6, 14, and 27, 1979.

The next meeting was held on November 29, 1979. The Union's representative was Howard Henson, Regional Manager for the Laborers' International Union. Although Henson was not called as a witness, the parties stipulated that he would have testified that he explained to Company representative Kelly that he was there to see whether "some movement could be made."

Henson and Kelly met again on December 3, 1979, and discussed seniority and the Company's desire to reorganize departments. Henson said that he would take the Company's proposal back to the Union committee.

Kelly also informed Henson, according to the latter's stipulated testimony, that he did not wish to deceive him, and handed him a list of strikers whom the Company intended to discharge. Henson replied that he would not discuss anything about firing strikers.

Kelly testified that he told Henson the employees had engaged in misconduct, warranting some kind of disciplinary action. According to Kelly, the Company had made no decision as of December 3, and would have considered some kind of discipline less than discharge.

On December 9, the Union sent a telegram to the Company reading as follows:

> "THIS IS TO ADVISE YOU THAT THE LAST COMPANY OFFER PRESENTED ON DECEMBER 3, 1979, HAS BEEN ACCEPTED AS A FINAL AND BINDING CONTRACT ALL EMPLOYEES WHO COULD BE CONTACTED WILL RETURN BACK TO WORK ON THEIR REGULARLY ASSIGNED SHIFTS EFFECTIVE DECEMBER 10, 1979 WE ARE PREPARED TO MEET AT YOUR CONVENIENCE TO SIGN THE AGREEMENT."

The strike ended the following day, December 10, and the strikers came back to the plant, but the Company did not allow all of them to return to work, as described hereinafter.

Kelly responded to the Union telegram by letter dated December 11, stating that several matters had to be resolved before there was agreement on a contract, and that this might be accomplished in one more meeting. The letter mentions the handling of strikers who had been replaced but who desired their jobs back, employees who allegedly had engaged in misconduct, and a pending "lawsuit" against the Company. Barnes also sent Kelly a letter

on the same date, asking for a meeting "to finalize the language and sign the Agreement."

The parties met again on December 19, with the intervention of a Federal mediator. Barnes returned as the principal Union representative instead of Henson, and Kelly continued for the Company. Kelly gave Barnes a proposed "Memorandum of Agreement" with 20 proposals, 2 of which are that the discharges of employees "who have been terminated" are to be "final and binding" upon the Union, and that the Union agree to withdraw "any proceeding or filing which it has initiated or plans to initiate with the National Labor Relations Board or courts against the Company or its employees."

Barnes stated that he had not engaged in any prior discussion with Kelly about discharging employees, although he acknowledged seeing a list of employees to be discharged which had been given to Henson (by Kelly on December 3). Barnes testified that he told Kelly that the employees were not guilty of the offenses with which they were charged.

Barnes was asked on cross-examination whether the Union's December 9 telegram, accepting the Company's December 3 offer, meant that the Union was accepting the Company's proposal to discharge employees. The Union representative replied that Kelly's statement to Henson on December 3 about discharging employees was not a "proposal", but, rather, was something the Company had already decided to do, and was not subject to bargaining. According to Barnes, the only "proposal" was the Company's position on departmental reorganization and progression of jobs, and it was this offer, plus all of the Company's previously stated positions, which the Union intended to accept by its December 9 telegram. Barnes stated that

these positions had become fixed as of November 6, and had remained the same through the November 14 and 27 meetings.

The December 19 meeting concluded, according to Barnes, with Kelly saying that the Union would have to sign the Memorandum of Agreement to which Barnes replied that he would not sign an agreement to discharge 20 employees. Kelly then received a telephone call, said that a decertification petition had been filed, and that the Company was not going to sign an agreement.

Kelly testified that the Memorandum of Agreement contained some subjects which were new, and others which had been covered previously. These were items "of concern" to Kelly, and he wanted "to get them straightened out." He obtained Barnes' agreement on some of the items but failed to reach an accord on others, including the provision for firing strikers.

The Company representative stated that he received a message during the meeting to the effect that a decertification petition had been filed, and that he informed the Union representatives of this fact. Kelly denied telling the Union that he would not sign an agreement under these circumstances. Instead, he informed the Union that he did not think the negotiations should continue with the decertification petition "hanging over our heads." (The petition was later dismissed.)

I credit Kelly's account of his reaction to the news of the decertification petition. However, I also credit Barnes' uncontradicted testimony that Kelly demanded that the Union agree to the terms in the Memorandum of Agreement, that Barnes refused to agree to the firing of strikers, and that the discussion of the decertification petition took place thereafter.

On February 22, 1980, Kelly wrote to Barnes that the Company had implemented its December 3 proposal on Company reorganization of departments, but was experiencing morale problems because of employee opposition to changes in shifts. Accordingly, Kelly suggested a change in the Company proposal. Barnes answered by telegram dated February 29, 1980, that the parties had a valid contract, and that the Union objected to any unilateral change. Kelly responded by letter dated March 3, 1980, to the effect that there was no contract. He noted that the Union had not submitted any document which the Company could sign—and suggested as the reason the fact that there were unresolved issues between the parties.

By letter of March 12, 1980, Barnes repeated the Union's opposition to any "modification of the language of our Agreement," and stated that the Agreement was "completely typed" and ready for signature. Kelly answered two days later, on March 14, 1980, with a request for a copy of the "alleged" agreement, and a restatement of the Company's position. On March 31, 1980, he wrote that he had not yet received a copy, and asked that it be sent as soon as possible. Kelly's letter avers that the Union's "continued refusal to forward a copy of the contract is . . . bad faith bargaining."

Barnes replied to Kelly by letter dated April 9, 1980, and apologized for the delay in his response, which he attributed to an automobile accident and hospitalization. Barnes repeated that the contract was "totally prepared and typewritten" and ready for signature, and expressed opposition to the Company's charge of Union bad faith. Further, Barnes contended, because Kelly had referred to an "alleged" agreement, and because of the Company's basic position, there was "little need in wasting the postage sending (the Company) a copy of the Agreement."

In a telegram to the Union's business manager, Tommy L. Williams, on June 6, 1980, Company counsel Weathersby requested a meeting to "confer, negotiate, and discuss" the documents mentioned in Barnes' March 12, 1980 letter to Kelly. The telegram requests a copy of the agreement, suggests a meeting with a Federal mediator, mentions three dates the Company would be available, and advises that the Company representative would have authority to execute a contract if in agreement with its terms. Weathersby repeated this request in letters to Williams and Barnes on June 10, 1980.

On June 11, 1980, Barnes replied to Weathersby by telegram attributing delay to the Company, but specifying possible meeting dates in July 1980. Weathersby replied by letter on June 19, 1980, with an agreement to meet on July 3, 1980, one of Barnes' suggested dates. The letter cautions that the Company was not making a commitment to execute a contract it had never reviewed.

Barnes testified at the hearing that he became ill on July 2, 1980, and instructed his secretary to cancel the July 3 meeting. On the same day, July 2, Weathersby sent duplicate telegrams to Barnes and Williams protesting the cancellation. Henson sent a telegram to Weathersby the following day saying that cancellation was necessary because Barnes was the only Union representative who could represent the Company's employees, and Barnes sent a telegram on July 7 attributing the cancellation to illness. Barnes noted that he would be busy the next few weeks on matters including the hearing in the instant case, but promised to get in touch with the Company as to an alternate date. Barnes testified (on July 14, 1980) that he sent the Company a copy of the proposed contract on July 11, 1980, after advising them of his action by telegram the prior day.

2. *Analysis and Conclusions*

The General Counsel argues that, although there were differences between the parties through the December 3 meeting, the Union's December 9 telegram accepted the Company's offers on all unresolved issues and constituted acceptance of those offers, thus creating a contract. He also argues that the Company's demand that the Union withdraw charges against the Company, and agree to the discharge of certain strikers for alleged misconduct, constituted insistence upon nonmandatory subjects for bargaining and therefore was violative of Section 8(a)(5). The Company argues that there was no agreement because of numerous unresolved issues despite the Union's telegram, and that therefore there was no contract to execute.

It is clear that there never was any agreement between the parties. All parties concede that there was no agreement prior to the December 3, 1979 meeting between Union Representative Henson and Company Representative Broughton Kelly. At that meeting, Kelly requested Union agreement to Company discipline, possibly discharge, of strikers who had allegedly engaged in misconduct. Barnes' testimony, to the effect that this was not a Company "proposal," is not persuasive. Although the strikers' discharge notices stated that they had been terminated November 15, this had not been implemented. Kelly's testimony shows that he wished to bargain with the Union about discipline of the strikers, and that the Company may have reconsidered the matter and may have contemplated discipline less than discharge. If not, the Company sought Union agreement to the discharges. Henson's stipulated testimony that he would not discuss the firing of strikers suggests that Kelly wished to bargain about the matter and Henson did not. It is obvious that the Company made a "proposal" at the December 3 negotiating session, involving

Union agreement to discipline of strikers, and that the Union refused to discuss the matter.

Nor did the Union intend to accept this proposal in its December 9 telegram. Barnes testified explicitly that that communication was intended only to accept the Company's December 3 offer on departmental organization and progression of jobs, plus the Company's position on all other unresolved issues. Since the telegram was not intended to accept the Company's proposal to discipline strikers, there was no meeting of the minds. This fact makes it unnecessary to consider the myriad of other issues which the Company contends were unresolved.

Inasmuch as there never was any agreement, the Company did not violate Section 8(a)(5) by refusing to execute one. [I note in passing that the Union did not deliver a copy of the alleged contract to the Company for signing until months after the supposed agreement.]

It is also clear that the Company, by demanding on December 19 that the Union withdraw "any proceeding or filing which it has initiated or plans to initiate with the National Labor Relations Board or courts," was thereby insisting on the Union's agreement to a nonmandatory subject of bargaining.[3] At the time of this demand, the Union had already filed a charge and an amended charge, on December 12 and 14, 1979, and thereafter filed additional charges as described above.

There is no evidence that the Company ever receded from this position, set forth on December 19, 1979, and

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3. *N.L.R.B. v. Local 964, United Brotherhood of Carpenters and Joiners of America*, 447 F.2d 643, 78 LRRM 2167, 2168 (2d Cir., 1971), enfg. 181 NLRB 948 (1970); *International Union of Operating Engineers, Local Union No. 12, et al.*, 246 NLRB No. 81 (1979); *Peerless Food Products, Inc.*, 231 NLRB 530 (1977); *Kit Manufacturing Co., Inc.*, 142 NLRB 957, 971 (1963), enfd. as mod. 335 F.2d 166, 56 LRRM 2988 (9th Cir., 1964).

the record shows that this was the last negotiating session. Although there were numerous communications thereafter, neither party changed position—the Union, that it had reached agreement with the Company; and the Company, that any agreement must contain the terms of the Memorandum of Understanding of December 19. I therefore find that the parties reached impasse on the terms of that Memorandum, including the Company's insistence on the Union's withdrawal of any "proceeding or filing." By such insistence the Company violated Section 8(a)(5) and (1) of the Act.[4]

The General Counsel's contention that the Company similarly violated the Act by insisting that the Union agree to the Company's discharge of certain strikers, presents a more difficult issue. The first question, of course, is whether the discharges were "terms and conditions of employment" within the meaning of Section 8(d) of the Act. It would seem that the most elementary "condition" of employment is the question of whether employment exists in the first place, and that it therefore is a mandatory subject of bargaining. And thus it appeared in an early case where the Supreme Court held that an employer's contract with a company-dominated union forestalled collective bargaining on the discharged employees' rights to present grievances over their discharges to the employer, through their chosen labor organization.[5]

Many cases later, however, distinctions began to appear, and Mr. Justice Stewart stated in a concurring opinion in the *Fibreboard* decision:[6] "On one view of the

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4. *Ibid.*

5. *National Licorice Co. v. N.L.R.B.*, 309 U.S. 350, 6 LRRM 674, 680 (1940).

6. *Fibreboard Paper Products Co. v. N.L.R.B.*, 379 U.S. 203, 57 LRRM 2609 (1964).

matter, it can be argued that the question whether there is to be a job is not a condition of employment; the question is not one of imposing conditions on employment, but the more fundamental question whether there is to be employment at all."[7] His concurring opinion, however, cites various employer practices which have been held to be mandatorily bargainable, and he ultimately agrees with the Court's opinion placing subcontracting in that classification.

As noted previously, the employees' discharge notices were dated November 15, but had not been implemented prior to the December 3 and December 19 negotiating sessions, in which the demand for Union agreement to the discharges or other discipline first arose. However, the Company did not allow the strikers to work on December 10, which, I find hereinafter, constituted disciplinary suspensions on that date, followed by discharge on December 20.

The Board has concluded that an employer's demand for nonreinstatement of illegally discharged employees is a nonmandatory subject of bargaining.[8] The question presented by the instant case is whether the legality or illegality of the discharges determines the legality or illegality of the Company's demand, under Section 8(a)(5), for Union waiver of the employees' employment rights.

In a recent case[9] the Board appears to have answered this question in the affirmative. In that case the union demanded reinstatement of an employee who had been discharged for reasons which were unknown, as a condition of the union's reaching agreement with the employer.

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7. *Ibid.* 57 LRRM at 2616-2617.

8. *Nordstrom, Inc.*, 229 NLRB 601, fn. 3, 609-610 (1977).

9. *Olin Corporation*, 248 NLRB 1137 (1980).

Noting that there was no contention that the discharge constituted an unfair labor practice by the employer, the Board stated: "An employer is entitled to discharge an employee for any reason so long as the motive is not discriminatory within the meaning of the Act. Thus we conclude that the Union's injection of (the employee's) termination into the ongoing bargaining was, in the circumstances, an attempt to frustrate the bargaining process, and we find it to be in violation of Section 8(b)(3)."[10]

This seems to mean that if the discharge *had been* discriminatorily motivated, the union would have been justified in conditioning agreement with the employer on reinstatement of the employee. A necessary corollary of this position is that an employer similarly does not violate Section 8(a)(5) if he conditions agreement with a union on nonreinstatement of a discharged employee, so long as the discharge was not unlawful. Principles of equity in assessing the relative bargaining obligations of employer and labor organization require this conclusion. As the Board stated, "An employer is entitled to discharge an employee for any reason so long as the motive is not discriminatory. . . ."[11] The result in *Nordstrom*[12] is not inconsistent with this rationale, because in that case the employees covered by the employer's nonreinstatement demand were unlawfully discharged, and, accordingly, the nonreinstatement demand was also found to be unlawful.

I conclude that disposition of this argument by the General Counsel awaits determination of the Section 8(a)(3) issues.

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10. *Ibid.*, 248 NLRB at 1141.

11. *Ibid.*

12. *Supra*, fn. 8.

C. *Alleged Violations of Section 8(a)(3)*

1. *Introduction*

As described above, the strike began on November 15, 1979. The comparative numbers of strikers, nonstrikers, and alleged discriminatees are not clear from the record. In a Complaint filed in a Georgia state court, described hereinafter, the Company stated that there were 200 employees in the plant. Plant Manager McCollum testified that he saw 140 pickets on the first day of the strike, while Industrial Relations Manager Barbara Lawler mentioned 60 as the most that she saw. Inasmuch as there are 28 employees alleged to have been discriminatorily discharged (in the first complaint), it is reasonable to infer, and I find, that there were at least twice as many strikers as alleged discriminatees.

After the Union's telegram of December 9, 1979, advising the Company that the Union was accepting the "last Company offer" (of December 3), and that employees would return to work on December 10, numbers of strikers reported for work. Some of these were put back to work immediately, although not necessarily on the same shift which they occupied before the strike. The first shift had been filled by permanent replacements, except for one job, and returning strikers were hired on the second shift on the basis of seniority and first in time to report to work. There was no third shift in December 1979.

Of the strikers who attempted to return, 28 (named in the first complaint) were not put back to work at that time. Separation notices of 25 strikers dated November 15 stated that they had been terminated for various alleged acts of misconduct. According to Industrial Relations Manager Lawler, however, the separations were not effectuated

until December 20, the day after the last bargaining session. It is clear nonetheless that the alleged discriminatees were not returned to work on December 10.

After the issuance of the first complaint (February 4, 1980), the Company offered all alleged discriminatees "positions of employment and reinstatement." It began a third shift, and the returning alleged discriminatees were returned to work on that shift, since the first and second shifts were filled. These employees gained no time for seniority and vacations until they reported for work in February 1980. Industrial Relations Manager Lawler credibly testified that third shift employees receive 15¢ more per hour than employees on other shifts doing the same work, that first and second shift vacancies existed after February 1980, and that there were third shift employees who did not bid for these vacancies although they were permitted to do so under plant rules.

The first complaint alleges that all 28 of the employees named therein were discriminatorily discharged because of their Union activities, and the second complaint alleges that 2 of these employees were also denied accrued vacation leave for the same reason.

The General Counsel's position at hearing was that the fact that the 28 discharged employees were strikers establishes a *prima facie* case of discriminatory motivation. In his brief the General Counsel appears to argue that the delay in time between the decision to fire certain strikers and the actual implementation of the discharges further establishes unlawful motive. The General Counsel further argues that the return of the 28 strikers to employment with the Company in February 1980 does not constitute "reinstatement."

The Company responds that the General Counsel has not established a *prima facie* case of discrimination, and points to the fact that it did take back some strikers on the day the strike ended. The Company acknowledges that, in past cases of discharge after extended absence, the notification of discharge was sent by mail, but contends herein that there was an inevitable delay because of the disruption of the strike, the strikers' unavailability during the strike, and the fact that Company policy on discharges required consultation among various supervisors before a decision could be made.

Of the 28 strikers that it did not take back until February 1980, the Company contends that 25 were discharged because of strike misconduct. Two were discharged because they refused different jobs at lesser pay which the Company offered them in lieu of their former jobs, which had been filled by permanent replacements. Even if these latter two discharges were "inappropriate," the Company further argues, the two employees have already received the maximum remedy allowable under Board law—placement on a preferential hiring list as economic strikers, and reemployment as soon as jobs became available. One striker, a probationary employee according to the Company, was discharged for alleged absenteeism.

The Company also alleges various events which compelled it to take protective and legal action. Thus, it contends that it suffered unusual property damage and suspected "sabotage" during the strike. Plant Manager McCollum stated that the blades of a "chipper"—a machine which converts pieces of wood into chips—were destroyed by a bullet which was found in the machine. A "gear box" was damaged because a "worm gear" was installed backwards. (Striker James Kelly, a maintenance expert, said this was impossible.)

Wires to a pump which controlled water to the boiler were cut, according to McCollum, which could have resulted in serious damage if the boiler exploded. Security Guard Richard Brown stated that he had a conversation at his father's house with striker Scott Fowler, who said that the boiler would not run when they tried to start it up. No water could get to the boiler when attempts were made to start it, and an investigation in which Brown participated determined that the wires were cut. (Fowler admitted a conversation with Brown at his father's house, but could not recall any discussion about the boiler.)

McCollum asserted that, after the strike began, nails and crates were found in the driveway, rocks were thrown, shots were fired in the plant, and there was mass picketing preventing access to the plant. After the cutting of the wires to the boiler pump, the Company hired a security dog service.

The Company also sought and obtained from a Georgia state court an injunction restraining the Union and individual strikers from engaging in various activities including damage to Company property, and sundry other alleged threats and intimidation.

The injunction also regulated the Union's conduct of picketing. Thus, the Union and individual strikers were enjoined *inter alia* from maintaining more than four pickets at any one time at an entrance to the Company's property, and from blocking or interfering with ingress and egress from Company property.

Following is a discussion of the factual issues in individual cases, including the evidence of alleged employee misconduct.

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3. *Alleged Employee Misconduct During the Strike*

* * *

(e) *Landis Bishop/Jeffrey A. Hughes—Visiting Home of Nonstriking Employee and Threatening Him*

The separation notices state that the above-named employees visited the home of a nonstriking employee and threatened his family and property.

William A. Walker testified that he did not go on strike, that Bishop and Hughes visited him at his home, and that a conversation took place. The evidence indicates that the two employees stood outside an opened glass door, with a screen door remaining closed. Walker's pregnant wife and young daughter were present. Walker said that Bishop and Hughes were drunk, cursed, and said that he was "screwing them out of their . . . damn money" by working during the strike. Bishop said that he would "take care of" Walker if he returned to work—a statement repeated by Hughes. Walker asked them to leave early in the conversation, but they took their time doing so.

Bishop said that he had been a Union steward, and that Walker was a probationary employee who had asked Bishop when he could become a Union member. He went to Walker's house to find out why he had returned to work. According to Bishop, Hughes had had only "one half of one beer," and the only improper language was the word "damn." Hughes said that Walker was "messing with a lot of other people's money." Walker asked whether they had come to threaten him, and Bishop denied it. However, Bishop stated that he told Walker that if he went back to work, he might be doing it at his own risk. Although neither Bishop nor Hughes would hurt him, other people might do so, according to Bishop.

I credit Walker's version of this incident, and find that the Company has established that Landis and Hughes threatened Walker with bodily injury.

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(g) *Preston D. Barlow—Abusive Language to Supervisor*

Barlow's termination notice states that he was discharged for abusive language on the picket line towards supervisors.

Industrial Relations Manager Lawler testified that, as she was crossing the picket line on the way to work one day, she heard Barlow refer to her as "that f------ bitch," and "that mother f-----, that ugly bitch." According to Lawler, Barlow referred to her as a "bitch" on another occasion. Barlow testified that he had a picket line conversation with Lawler, but could not remember, or did not think, that he made any such remarks.

Lawler was a more reliable witness. I credit her testimony, and find that the Company has established the conduct attributed to Barlow in his separation notice.

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5. *Legal Analysis of Alleged Section 8(a)(3) Violations*

(a) *The Issue of Discriminatory Motivation*

As described above, there were at least twice as many strikers as the 28 alleged discriminatees. This is based on Lawler's testimony that she saw about 60 pickets during the first days of the strike. If McCollum's estimate of 140 pickets is correct, the number of strikers compared to alleged discriminatees is even greater. The total employee complement was about 200.

Other than the alleged discriminatees, the strikers were put back to work on the second shift when the strike ended, with some exceptions who were placed on a preferential hiring list. There is no suggestion that any of these strikers were subjected to any unfair labor practices. The Company asserts that it singled out the 28 alleged discriminatees because of strike misconduct.

In similar circumstances, Board and court cases have concluded that absence of employer disciplinary action against some employees engaged in protected activity is evidence that disciplinary action against other such employees was not discriminatorily motivated.[37] I conclude that this evidentiary principle is determinative herein on the issue of the Company's motivation.

It may further be noted that there is a dearth of anti-union statements and action by the Company. All of the alleged independent violations of Section 8(a)(1) are without foundation and should be dismissed, except the Company's statement to employees that there was no formal grievance procedure. This latter statement was accurate in the sense that there was no existing contract at the time, and becomes a violation only because of the somewhat esoteric principle that the grievance procedure survives the expired contract. I conclude that the Company was simply unaware of this requirement, and that McCollum's statements reflected lack of knowledge and indecision,

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37. *Teledyne McCormack Selph, A Division of Teledyne, Inc.*, 246 NLRB No. 127 (1979); *Pedro's Inc. d/b/a Pedro's Restaurant*, 246 NLRB No. 92 (1979); *Triana Industries, Inc.*, 245 NLRB No. 161 (1979); *Bill Kraft's Restaurant Food Products Co.*, 241 NLRB No. 162 (1979); *J. Ray McDermott & Co., Inc.*, 233 NLRB 946 (1977); *B. F. Goodrich Co.*, 232 NLRB 1066 (1977); *Winn-Dixie Stores, Inc. v. N.L.R.B.*, 448 F.2d 8, 78 LRRM 2375 (4th Cir., 1971), enf. as mod. 181 NLRB 611 (1970); *Hyster Co. v. N.L.R.B.*, 480 F.2d 1081, 83 NLRB 2801 (5th Cir., 1973), enf. as mod. 198 NLRB 192 (1972).

rather than anti-union animus. This conclusion is buttressed by the fact that in all other respects the Company was quite scrupulous in its observation of employee rights—such as the policy of having a Union steward present during disciplinary interviews, where possible and where desired by the employee.

I find no merit in the General Counsel's argument that the Company's delay in notifying employees of their discharges is evidence of unlawful motive. The evidence is persuasive that Company disciplinary policy was consultative in nature, with final authority in some cases being exercised by Broughton Kelly. There is an inevitable delay in any such policy. There is also the fact that most of the dischargees were not present in the plant at the time of the alleged conduct warranting dismissal.

Finally, the Company delayed in such notification not because of any discriminatory motivation, but, rather, because it sought Union agreement on the subject of discipline of employees. Although the separation notices are dated November 15, the Company initially hoped to avoid conflict on this subject with the Union. Broughton Kelly said that he wanted to "get on board" with this subject, and first broached it in the December 3 negotiating session, as described above. At that date, according to his credible testimony, the Company was willing to consider discipline less than discharge. However, the Union failed to agree then and also failed to agree to the Company's December 19 Memorandum of Understanding incorporating the subject of discipline. The Company discharged the employees the following day, December 20, 1979. Rather than constituting evidence of unlawful motive, the Company's delay in discharging the employees evidences its desire to obtain accord with the Union on this subject.

The grounds which the Company sought to establish for Union approval of striker discipline further show that concern for misconduct rather than anti-union animus was the motivating force in the Company's action. Thus, it is quite clear that serious misconduct did occur. A gun was pointed at the plant manager, the wires to the boiler were cut, and a rock was thrown at a supervisor's car, to name a few. It is true that not all the Company's accusations of misconduct are warranted, and that it may not justifiably impute general misconduct to a specific employee absent proof involving that individual.[38] However, the rather widespread acts of violence and near violence, culminating in the state court injunction, suggest that the Company had a genuine problem, and that it was that problem rather than opposition to the Union which caused it to take the action that it did.

In the final analysis, the employees were discharged on December 20. Actually, the Company denied them work on December 10, at the time the other strikers returned and were put back to work. As previously indicated, I conclude that this action by the Company constituted disciplinary suspension of the employees on December 10, because of alleged misconduct during their exercise of protected activity, to wit, the strike.

It is established law that the discharge of an employee engaged in protected activity, for alleged misconduct which did not in fact occur, violates Section 8(a)(1) of the Act regardless of the employer's motivation.[39] Although the

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38. *American Cyanamid Co.*, 239 NLRB No. 60 (1978).

39. *N.L.R.B. v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964); *Roadway Express, Inc.*, 250 NLRB No. 61 (1980). Where the employer proves an "honest belief" in the alleged misconduct, the burden then shifts to the General Counsel to establish that the employee did not in fact engage in such conduct or engaged in other conduct not sufficiently grave to warrant discharge. *Rubin Brothers Footwear, Inc.*, 99 NLRB 610 (1952).

discharges did not technically take place until December 20, 1979, there is no logical reason why the same principle should not apply to the disciplinary suspensions on December 10. These considerations make necessary a legal assessment of the individual acts of alleged misconduct described above.

(b) *Legal Analysis of Individual Misconduct*

1. *Violence and threats of violence*

Striker Scott Fowler's clenching his fist and pointing a gun at Plant Manager McCollum are serious acts of misconduct warranting discharge, and I so find.

As set forth above, the evidence establishes that striker Crosby Favors threw a rock which hit Supervisor Virgil Williams' car as the latter was passing through the picket line. The Board has concluded that discharges based on similar conduct were lawful,[40] and the same conclusion is warranted herein.

The credited evidence establishes that Landis Bishop and Jeffrey A. Hughes visited a nonstriking employee at his home and, in the presence of his family, threatened him with bodily injury if he returned to work. The Board and one Circuit Court of Appeals have decided that similar action warranted discharge of employees,[41] and I find that this principle is applicable to Bishop and Hughes.

As heretofore delineated, the only striker comment to job applicant Raymond Reeves which was threatening

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40. *Gold Kist, Inc.*, 245 NLRB No. 142 (1979); *Giddings & Lewis, Inc.*, 240 NLRB No. 64 (1979); *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973); *Spotlight Company, Inc.*, 192 NLRB 491 (1971).

41. *Otsego Ski Club-Hidden Valley, Inc.*, 217 NLRB 408 (1975); *New Fairview Hall Convalescent Home*, ibid.; *N.L.R.B. v. Syncro Corp.*, 597 F.2d 922, 101 LRRM 2790 (5th Cir., 1979), den'g. enf. 234 NLRB 550 (1978).

was that of Crosby Favors, who said that he would not be responsible if something happened to Reeves, and that something might happen to his children. However, this threat was not alleged in Favors' separation notice, and therefore could not have been a cause of the Company's first suspending and then discharging him. In any event, I have already determined that Favors engaged in other misconduct warranting discharge.

Although the credited evidence shows that Joseph M. Williams made statements to other employees about supervisors "getting their asses whopped," and similar statements, he did not make these statements directly to supervisors. I therefore find that Williams did not make threatening statements to supervisors warranting discharge, as alleged in his separation notice.

2. *Obscene and abusive language*

Industrial Labor Relations Manager Barbara Lawler heard Preston D. Barlow make the profane statements about her, described above, as she drove through the picket line.

Board cases on employee profanity to supervisors as grounds for discharge come down on both sides of the issue. On the one hand, it is held that such language is customary in industrial settings.[42] There are, however, cases which conclude that profane language to supervisors constitutes misconduct of sufficient gravity to warrant disciplinary action.[43]

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42. *Van Guard Carpet Mills*, 246 NLRB No. 106 (1979), *Publisher's Printing Co., Inc.*, 246 NLRB No. 36 (1979).

43. *Rockland Chrysler Plymouth, Inc.*, 209 NLRB 1045 (1974). See also *Atlantic Steel Co.*, 245 NLRB No. 107 (1979), where the Board overruled the Administrative Law Judge on this issue and deferred to an arbitrator's award.

Some cases appear to make distinctions based on the sex of the employee or supervisor involved, considering offensive remarks to be more opprobrious if made to a female.[44] One Circuit Court of Appeals described similar language, and an overt gesture, as "vulgar and offensive by any standard of decency."[45]

I find that Barlow's statements about a supervisor, made within her hearing in the presence of other employees, were sufficiently insulting and abusive so as to justify his discharge. In making this determination, I take into account the minimal anti-union animus on the part of the Company, and the consequent likelihood that it was Barlow's statements rather than his strike activity which precipitated the Company's action.

The facts involving Joseph M. Williams' statements about Lawler and Eley require a different conclusion, however. Neither Lawler nor Eley heard the statements, which were made to other employees on the morning of November 15 a few minutes before the strike began, in an atmosphere of turbulence. It is obvious that offensive remarks have greater impact if made to, or heard by, the person about whom they are made. I conclude that Williams' remarks about Lawler and Eley, not heard by either of them, were not serious enough to justify his discharge.

* * *

5. *Summary of misconduct cases*

For the reasons given above, I find that strikers Scott Fowler, Crosby Favors, Landis Bishop, Jeffrey A. Hughes, and Preston D. Barlow engaged in strike misconduct,

44. *Veeder-Root Co.*, 192 NLRB 973 (1971).

45. *Mueller Brass Co. v. N.L.R.B.*, 544 F.2d 815, 94 LRRM 2225, 2226 (5th Cir., 1977), den'g. enf. 220 NLRB 1127 (1975).

known by the Company prior to their discharges, of sufficient gravity to warrant such discipline. I also find that none of the other alleged discriminatees charged by the Company with misconduct[49] actually engaged in same.

* * *

Conclusions of Law

1. Georgia Kraft Company, Woodcraft Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Laborers' Local Union No. 246 is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Company committed unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) Telling employees that there was no formal grievance procedure, where such employees had been subject to a recently expired collective-bargaining agreement which contained such procedure.

(b) Discharging strikers Clarence Watson and Wiley Shepherd on December 20, 1979, for refusal to accept jobs which were not substantially equivalent to their former jobs.

(c) Suspending on December 10, 1979, and discharging on December 20, 1979, the following-named employees for engaging in alleged strike misconduct warranting such discipline, when in fact the employees had not engaged in same:

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49. Kenneth V. Palmer, Phillip J. Faulkner, Charles Brown, James Kelly, Jerry Kirbo, John Ward, Mary Burth, Robert Barry McCoy, Anthony Crouch, Eulice Favors, Cecil Barber, Carlene Frost, Yvonne Blalock, James O'Neal, Joseph M. Williams, Robin O. Boudrie, Michael W. Buttram, Robert L. Russell, Donald Ray Thrash, Stephen C. Smith.

Kenneth V. Palmer	Cecil Barber
James Kelly	James O'Neal
Mary Burth	Michael W. Buttram
Eulice Favors	Stephen C. Smith
Yvonne Blalock	Charles Brown
Robin O. Boudrie	John Ward
Donald Ray Thrash	Anthony Crouch
Phillip J. Faulkner	Carlene Frost
Jerry Kirbo	Joseph M. Williams
Robert Barry McCoy	Robert L. Russell

4. By failing and refusing to pay accrued vacation pay to Carlene Frost and Mary Burth, without adequate business justification for such refusal, the Company violated Section 8(a)(3) and (1) of the Act.

5. By insisting to impasse that the Union agree (a) to withdraw charges previously filed with the National Labor Relations Board and the courts, and (b) to the discharge of employees for alleged misconduct in which they had not in fact engaged, the Company thereby insisted on nonmandatory subjects of bargaining in violation of Section 8(a)(5) and (1) of the Act.

6. The Company has not engaged in any other unfair labor practices.

IV. The Remedy

It having been found that the Company has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Company violated Section 8(a)(1) of the Act by the suspension and/or dis-

charge of the employees named in Conclusions of Law 3(b) and 3(c), the Company shall be ordered to make them whole for any loss of pay or other benefits they may have suffered as a result of their unlawful suspensions and/or discharges.

As for the employees listed in Conclusions of Law 3(c), who were discharged for alleged misconduct, but who were returned to work in February 1980, the Company shall be ordered to pay them backpay with interest[68] from the time of their disciplinary suspensions on December 10, 1979, until the time of their return to employment in February 1980,[69] and to credit their employment records for the same period with working time for vacation and seniority purposes.

The Company shall also be ordered to credit for such purposes the employment records of Clarence Watson and Wiley Shepherd from December 20, 1979, the date of their unlawful discharges, until the dates of their return to employment. In addition, the Company shall be ordered to reconstruct, on a daily basis, its personnel records since the time of their discharges, for the purpose of establishing whether any substantially equivalent job became available for either of them prior to the time when he returned to employment with the Company. In the event that such reconstruction of personnel records establishes that there was such prior job, and that the Company would have hired Watson or Shepherd, in the order and according to the method which it was then utilizing, had such employee been on a preferential hiring list, then the Company shall be ordered to make such employee whole by paying him backpay from the date of availability of such job to the

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68. See *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

69. *Roadway Express, Inc.*, *supra*, fn. 39 (sl. op., p. 8, fn. 7).

date he returned to employment with the Company, with interest.[70]

It having been found that the Company unlawfully failed and refused to pay Carlene Frost and Mary Burth accrued vacation pay in violation of Section 8(a)(3) and (1) of the Act, the Company shall be ordered to pay said vacation pay to them, with interest from the date that such vacation pay would normally have been paid.[71]

It having been found that the Company has refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act, it shall be ordered to cease and desist therefrom, and, upon request, bargain with the Union.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I recommend the following:

ORDER[72]

Georgia Kraft Company, Woodcraft Division, its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Telling its employees that there is no grievance procedure.

(b) Suspending, discharging, or otherwise disciplining employees for alleged misconduct in which they have not engaged.

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70. *Supra*, fn. 68.

71. *Ibid.*

72. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Discharging employees for refusal to accept jobs which are not substantially equivalent to their former jobs.

(d) Failing and refusing to pay accrued vacation pay to employees who are entitled to same; or

(e) Refusing to bargain in good faith with Laborer's Local Union No. 246.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Pay each of the following listed employees backpay from December 10, 1979, until such time as he or she returned to employment with the Company, in the manner set forth in the section of this Decision entitled "The Remedy," and credit the employment record of each such employee, for such period, with working time for seniority and vacation purposes:

Kenneth V. Palmer	Cecil Barber
James Kelly	James O'Neal
Mary Burth	Michael W. Buttram
Eulice Favors	Stephen C. Smith
Yvonne Blalock	Charles Brown
Robin O. Boudrie	John Ward
Donald Ray Thrash	Anthony Crouch
Phillip J. Faulkner	Carlene Frost
Jerry Kirbo	Joseph M. Williams
Robert Barry McCoy	Robert L. Russell

(b) Credit the employment records of Clarence Watson and Wiley Shepherd with working time from December 20, 1979, until such time as each of them returned to employment with the Company, for seniority and vacation purposes.

Prepare and submit to the Regional Director for Region 10 a reconstructed daily record of available jobs and names of incumbents holding such positions, including the date of their hire, and vacancies, if any, for the same period indicated above.

In the event that such reconstructed record shows that the same job held by Watson or Shepherd, or a substantially equivalent one, became available prior to the time such employee was rehired, make him whole for any loss of pay he may have suffered by reason of the Company's unlawful discharge of him, in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

(c) Make whole Carlene Frost and Mary Burth by paying each of them two weeks' vacation pay for 1979, to the extent that they have not already received same, with interest as set forth in the section of his Decision entitled "The Remedy."

(d) Upon request, bargain with Laborers' Local Union No. 246, and, if agreement is reached, embody same in a written agreement.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the extent of the Company's actions required to comply with this Order, and the amount of backpay due.

(f) Post at its plant at Greenville, Georgia copies of the attached notice marked "Appendix."[73] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by the Company's representative, shall be posted by it, immediately upon receipt thereof, for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Company has taken to comply therewith.

IT IS ORDERED that the complaints be dismissed insofar as they allege violations of the Act not specifically found.

Dated at Washington, D.C. December 18, 1980.

/s/ Howard I. Grossman
Howard I. Grossman
Administrative Law Judge

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73. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPLICABLE STATUTORY PROVISIONS

The relevant provisions of the National Labor Relations Act ("Act") (29 U.S.C. § 151 *et seq.*) are as follows:

1. Section 7 of the Act (29 U.S.C. § 157) provides: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

2. Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5) provides:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

3. Section 8(c) of the Act (29 U.S.C. § 158(c)) provides:

> (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

4. Section 8(d) of the Act (29 U.S.C. § 158(d)) provides:

> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal to require the making of a concession.

5. Section 10(e) of the Act (29 U.S.C. § 160(e)) provides in pertinent part:

> The Board shall have the power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or

in part the order of the Board . . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive.

6. Section 10(f) of the Act (29 U.S.C. § 160(f)) provides in pertinent part:

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside . . . . Upon filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board, the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.